

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAY WILLIAM MENZEL,

Defendant-Appellant.

UNPUBLISHED

January 27, 1998

No. 196992

Missaukee Circuit Court

LC No. 95-001119 FH

Before: MacKenzie, P.J., and Holbrook, Jr., and Saad, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of larceny by conversion, MCL 750.362; MSA 28.594. He was sentenced to two years' probation and ordered to pay restitution. Defendant appeals as of right. We affirm.

In the spring of 1995, defendant and Dale Shaw negotiated a contract for the construction of a pond on Shaw's property. Defendant told Shaw that he was with "Ponds Plus." Defendant required a \$1,600 deposit for the project, which was to be completed by May 1. According to Shaw, defendant later called and said he was busy the day he was supposed to bring the contract to be signed, and that he would send his daughter, Michelle Menzel, with the contract. Shaw signed the contract and gave defendant's daughter the \$1,600 deposit on April 20, 1995. The deposit was placed in a Ponds Plus bank account that was in defendant's and his daughter's names. Shaw testified that at some point he learned that Ponds Plus was registered in Michelle Menzel's name, but he stated that aside from his April 20 contact with her, all discussions concerning the project were with defendant. Michelle Menzel moved at the end of April, leaving the business in defendant's hands. Ponds Plus never completed construction of the pond, according to defendant because the ground was too wet. Defendant admitted receiving a May 26, 1995, letter demanding that the deposit money be returned to Shaw. It was not.

On appeal, defendant first argues that there was insufficient evidence to support his conviction of larceny by conversion. We disagree. When reviewing the sufficiency of the evidence in a criminal case, this Court views the evidence in the light most favorable to the prosecution to determine whether a rational factfinder could have found the essential elements of the crime proved beyond a reasonable

doubt. *People v Wolfe*, 440 Mich 508; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The elements of larceny by conversion are: (1) the valuable property of another was delivered over to the defendant; (2) the defendant then converted the property to his own use; (3) at the time of the conversion, the defendant intended to permanently defraud or cheat the owner of the property; and (4) the conversion was without the property owner's consent. *People v Scott*, 72 Mich App 16, 19; 248 NW2d 693 (1976). Defendant's sufficiency argument focuses on the elements of delivery, conversion to personal use, and intent.

Defendant argues that the element of delivery was not proven because the deposit was given to his daughter, who was at the time the head of Ponds Plus, and because the money was then deposited in the business' bank account. The evidence presented at trial, however, established that defendant, not his daughter, was the de facto head of Ponds Plus. Further, defendant admitted that he had full access to the joint bank account in which the deposit money was placed. This evidence supports a finding that the deposit money had been delivered to defendant. See *People v Miciek*, 106 Mich App 659, 665; 308 NW2d 603 (1981).

Defendant next argues that the prosecution failed to prove that defendant converted the money to his own use. Again, we disagree. Defendant himself admitted at trial that most of the deposit money had been spent not on construction of the pond, but rather on advertising for the company. We conclude that this use of the money was against Shaw's interests and thus amounts to conversion. See *Miciek, supra*, p 666 (observing that "[t]he gist of this element is that defendant exercises dominion or control or uses the property against the interest of the actual owner").

Finally, defendant argues that the prosecution failed to show that he had the requisite intent. A defendant's intent may be established by circumstantial evidence that leads to the reasonable inference that the defendant had the required intent. *Miciek, supra*, p 667. Viewing the evidence in this case in a light most favorable to the prosecution, a rational trier of fact could conclude that defendant intended to cheat Shaw out of the money. The record shows that soon after defendant entered into the contract, he lost interest in completing the project but nevertheless spent most of the deposit money on advertising for the company. Further, defendant chose to ignore a demand made by the complaining witness for the return of the deposit money.

Defendant next asserts that he was prejudiced by the oath administered to the jury. The oath administered was taken from MCL 768.14; MSA 1037: "“You shall well and truly try, and true deliverance make, between the people of the state and the prisoner at bar, whom you shall have in charge, according to the evidence and the laws of this state; so help you God?”" Defendant argues that he was prejudiced by the oath's reference to him as a "prisoner." We find this argument totally without merit. Defendant fails to either challenge the constitutionality of the statute or show how he was prejudiced by the oath.

Defendant also argues that the trial court erred when it failed to sua sponte instruct the jury on misdemeanor larceny by conversion. We disagree. Defendant did not request the instruction, and the evidence did not rationally allow for a finding that defendant converted less than \$100. Accordingly, the trial court did not abuse its discretion in failing to give the instruction. *People v Stephens*, 416 Mich

252, 261-264; 330 NW2d 675 (1982), *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1993).

Defendant next claims that the prosecutor improperly inflamed the passions of the jury during his closing argument. The remarks defendant cites as improper were two hypotheticals offered by the prosecution as illustrations of the element of intent. Defendant's failure to object to the comments at the time they were made means that review is precluded absent a showing that it would result in a miscarriage of justice. *People v Whitfield*, 214 Mich App 348, 352; 543 NW2d 347 (1995). Because the prosecutor repeatedly emphasized that the hypotheticals were merely examples, our failure to review the issue would not lead to a miscarriage of justice.

Defendant's final argument is that he was denied the effective assistance of counsel. Defendant did not preserve this issue for appeal by moving for an evidentiary hearing. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Thus, our review is limited to the existing record. *People v Johnson*, 144 Mich App 125, 130; 373 NW2d 263 (1985).

To prevail on a claim of ineffective assistance of counsel, defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Accordingly, any deficiencies in counsel's performance must be prejudicial to defendant in order to constitute ineffective assistance. *Strickland v Washington*, 466 US 668, 692; 104 S Ct 2052; 80 L Ed 2d 674 (1984), *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). Further, the defendant is required to overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997).

We conclude that defendant has failed to establish in any of the instances cited that defense counsel's performance fell below an objective standard of reasonableness, or that he was in any way prejudiced by his counsel's actions. Defendant first asserts that his counsel's ineffective assistance is evidenced by counsel's failure to call a particular witness to testify at trial. However, because defendant's assertion is based entirely upon the contents of an affidavit supplied by the witness, which is not a part of the existing record, it fails for lack of support. *Johnson, supra*, p 130. Second, defendant contends that his counsel suggested to the jury that they could convict defendant on a standard of proof less stringent than the beyond a reasonable doubt standard. Taken in context, however, the remarks cited by defendant as support for this assertion were actually commentary on the crime of larceny by conversion itself, and not the standard of proof applicable to all criminal prosecutions. Third, defendant asserts that counsel's ineffective assistance is evidenced by counsel's failure to raise an objection at several points in the trial. All but one of these alleged failures relate to issues raised previously by defendant on appeal. Because we have concluded in each of these instances that no error occurred, counsel's failure to object was not prejudicial. The final cited instance involves counsel's failure to object to the manner in which the prosecutor questioned the complaining witness. Because defendant has failed to establish how this failure was either unreasonable or prejudicial, we also reject this argument. Defendant was not denied the effective assistance of counsel.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Donald E. Holbrook, Jr.
/s/ Henry William Saad